Subpart L—Nonconformance Penalties for Gasoline-Fueled and Diesel Heavy-Duty Engines and Heavy-Duty Vehicles, Including Light-Duty Trucks

SOURCE: 50 FR 35388, Aug. 30, 1985, unless otherwise noted.

§86.1101–87 Applicability.

(a) The provisions of this subpart are applicable for 1987 and later model year gasoline-fueled and diesel heavy-duty engines and heavy-duty vehicles. These vehicles include light-duty trucks rated in excess of 6,000 pounds gross vehicle weight.

(b) References in this subpart to engine families and emission control systems shall be deemed to refer to durability groups and test groups as applicable for manufacturers certifying new light-duty trucks under the provisions of subpart S of this part.

[64 FR 23922, May 4, 1999]

§86.1102–87 Definitions.

(a) The definitions in this section apply to this subpart.

(b) As used in this subpart, all terms not defined herein have the meaning given them in the Act.

Compliance level means the deteriorated pollutant emissions level at the 60th percentile point for a population of heavy-duty engines or heavy-duty vehicles subject to Production Compliance Audit testing pursuant to the requirements of this subpart. A compliance level for a population can only be determined for a pollutant for which an upper limit has been established in this subpart.

Configuration means a subdivision, if any, of a heavy-duty engine family for which a separate projected sales figure is listed in the manufacturer's Application for Certification and which can be described on the basis of emission control system, governed speed, injector size, engine calibration, or other parameters which may be designated by the Administrator, or a subclassification of light-duty truck engine family emission control system combination on the basis of engine code, inertia weight class, transmission type and gear ratios, rear axle ratio, or other parameters which may be designated by the Administrator.

NCP means a nonconformance penalty as described in section 206(g) of the Clean Air Act and in this subpart.

PCA means Production Compliance Audit as described in §86.1106–87 of this subpart.

Subclass means a classification of heavy-duty engines of heavy-duty vehicles based on such factors as gross vehicle weight rating, fuel usage (gasoline-, diesel-, and methanol-fueled), vehicle usage, engine horsepower or additional criteria that the Administrator shall apply. Subclasses include, but are not limited to:

(i) Light-duty gasoline-fueled Otto cycle trucks (6,001–8,500 lb. GVW)

(ii) Light-duty methanol-fueled Otto cycle trucks (6,001–8,500 lb. GVW)

(iii) Light-duty petroleum-fueled diesel trucks (6,001–8,500 lb. GVW)

(iv) Light-duty methanol-fueled diesel trucks (6,001–8,500 lb. GVW)

(v) Light heavy-duty gasoline-fueled Otto cycle engines (for use in vehicles of 8,501–14,000 lb. GVW)

(vi) Light heavy-duty methanol-fueled Otto cycle engines (for use in vehicles of 8,501–14,000 lb. GVW)

(vii) Heavy heavy-duty gasoline-fueled Otto cycle engines (for use in vehicles of 14,001 lb and above GVW)

(viii) Heavy heavy-duty methanol-fueled Otto cycle engines (for use in vehicles of 14,001 lb. and above GVW)

(ix) Light heavy-duty petroleum-fueled diesel engines (see §86.085–2(a)(1))

(x) Light heavy-duty methanol-fueled diesel engines (see §86.085–2(a)(1))

(xi) Medium heavy-duty petroleum-fueled diesel engines (see §86.085–2(a)(2))

(xii) Medium heavy-duty methanol-fueled diesel engines (see §86.085–2(a)(2))

(xiii) Heavy heavy-duty petroleum-fueled diesel engines (see §86.085–2(a)(3))

(xiv) Heavy heavy-duty methanol-fueled diesel engines (see §86.085–2(a)(3))

(xv) Petroleum-fueled Urban Bus engines (see §86.091–2)

(xvi) Methanol-fueled Urban Bus engines (see §86.091–2).

For NCP purposes, all optionally certified engines and/or vehicles (engines certified in accordance with § 86.087–10(a)(3) and vehicles certified in accordance with § 86.085–1(b)) shall be considered part of, and included in the FRAC calculation of, the subclass for which they are optionally certified.

Test Sample means a group of heavy-duty engines or heavy-duty vehicles of the same configuration which have been selected for emission testing.

Upper limit means the emission level for a specific pollutant above which a certificate of conformity may not be issued or may be suspended or revoked.

[50 FR 35388, Aug. 30, 1985, as amended at 55 FR 46628, Nov. 5, 1990]

§ 86.1103–87 Criteria for availability of nonconformance penalties.

(a) EPA shall establish for each subclass of heavy-duty engines and heavy-duty vehicles (other than motorcycles), an NCP for a motor vehicle pollutant, when any new or revised emission standard is more stringent than the previous standard for the pollutant, or when an existing standard for that pollutant becomes more difficult to achieve because of a new or revised standard, provided that EPA finds:

(1) That for such subclass of engines or vehicles, substantial work will be required to meet the standard for which the NCP is offered, and

(2) That there is likely to be a technological laggard.

(b) Substantial work, as used in paragraph (a)(1) of this section, means the application of technology not previously used in an engine or vehicle class or subclass, or the significant modification of existing technology or design parameters, needed to bring the vehicle or engine into compliance with either the more stringent new or revised standard or an existing standard which becomes more difficult to achieve because of a new or revised standard.

§ 86.1104–91 Determination of upper limits.

(a) The upper limit applicable to a pollutant emission standard for a subclass of heavy-duty engines or heavy-duty vehicles for which an NCP is established in accordance with § 86.1103–87, shall be the previous pollutant emission standard for that subclass.

(b) If no previous standard existed for the pollutant under paragraph (a) of this section, the upper limit will be developed by EPA during rulemaking.

(c) If a manufacturer participates in any of the emissions averaging, trading, or banking programs, and carries over certification of an engine family from the prior model year, the upper limit for that engine family shall be the family emission limit of the prior model year, unless the family emission limit is less than the upper limit determined in paragraph (a) of this section.

[55 FR 30629, July 26, 1990]

§ 86.1105–87 Emission standards for which nonconformance penalties are available.

(a)–(b) [Reserved]

(c) Effective in the 1991 model year, NCPs will be available for the following additional emission standards:

(1) [Reserved]

(2) Petroleum-fueled diesel heavy-duty engine oxides of nitrogen standard of 5.0 grams per brake horsepower-hour.

(i) For petroleum-fueled light heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(*1*) COC_{50}: $830.

(*2*) COC_{90}: $946.

(*3*) MC_{50}: $1,167 per gram per brake horsepower-hour.

(*4*) F: 1.2.

(B) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with § 86.1113–87(h): 0.12.

(ii) For petroleum-fueled medium heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(*1*) COC_{50}: $905.

(*2*) COC_{90}: $1,453.

(*3*) MC_{50}: $1,417 per gram per brake horsepower-hour.

(*4*) F: 1.2.

(B) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with § 86.1113–87(h): 0.11.

(iii) For petroleum-fueled heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with §86.1113–87(a):

(*1*) COC_{50}: $930.

(*2*) COC_{90}: $1,590.

(*3*) MC_{50}: $2,250 per gram per brake horsepower-hour.

(*4*) F: 1.2.

(B) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with §86.1113–87(h): 0.11.

(3) Petroleum-fueled diesel light-duty trucks (between 6,001 and 14,000 lbs GVW) particulate matter emission standard of 0.13 grams per vehicle mile.

(i) The following values shall be used to calculate an NCP in accordance with §86.1113–87(a):

(A) COC_{50}: $711.

(B) COC_{90}: $1,396.

(C) MC_{50}: $2,960 per gram per brake horsepower-hour.

(D) F: 1.2.

(ii) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with §86.1113–87(h): 0.01.

(d) Effective in the 1993 model year, NCPs will be available for the following additional emission standard:

(1) Petroleum-fueled diesel bus engine (as defined in §86.093–2) particulate emission standard of 0.10 grams per brake horsepower-hour.

(i) The following values shall be used to calculate an NCP for the standard set forth in §86.093–11(a)(1)(iv)(A) in accordance with §86.1113–87(a):

(A) COC_{50}: $4,020.

(B) COC_{90}: $4,535.

(C) MC_{50}: $22,971 per gram per brake horsepower-hour.

(D) F: 1.2.

(E) UL: 0.25 grams per brake horsepower-hour.

(ii) The following factor shall be used to calculate the engineering and development component of the NCP for the standard set forth in §86.093–11(a)(1)(iv)(A) in accordance with §86.1113–87(h): 0.02.

(2) [Reserved]

(e) The values of COC_{50}, COC_{90}, and MC_{50} in paragraphs (a) and (b) of this section are expressed in December 1984 dollars. The values of COC_{50}, COC_{90}, and MC_{50} in paragraphs (c) and (d) of this section are expressed in December 1989 dollars. The values of COC_{50}, COC_{90}, and MC_{50} in paragraph (f) of this section are expressed in December 1991 dollars. The values of COC_{50}, COC_{90}, and MC_{50} in paragraphs (g) and (h) of this section are expressed in December 1994 dollars. These values shall be adjusted for inflation to dollars as of January of the calendar year preceding the model year in which the NCP is first available by using the change in the overall Consumer Price Index, and rounded to the nearest whole dollar in accordance with ASTM E29–67 (reapproved 1980), Standard Recommended Practice for Indicating Which Places of Figures are to be Considered Significant in Specified Limiting Values. The method was approved by the director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. This document is available from ASTM, 1916 Race Street, Philadelphia, PA 19103, and is also available for inspection as part of Docket A–91–06, located at the Central Docket Section, EPA, 401 M Street, SW, Washington, DC or at the office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC. This incorporation by reference was approved by the Director of the Federal Register on January 13, 1992. These materials are incorporated as they exist on the date of the approval and a notice of any change in these materials will be published in the FEDERAL REGISTER.

(f) Effective in the 1994 model year, NCPs will be available for the following emission standards:

(1) Petroleum-fueled urban bus engine (as defined in §86.091–2) particulate emission standard of 0.07 grams per brake horsepower-hour.

(i) The following values shall be used to calculate an NCP for the standard set forth in §86.094–11(a)(1)(iv)(A) in accordance with §86.1113–87(a):

(A) COC_{50}: $3292.

(B) COC_{90}: $10,014.

(C) MC_{50}: $109,733.

(D) F: 1.2.

(ii) The following factor shall be used to calculate the engineering and development component of the NCP for the standard set forth in §86.094–

11(a)(1)(iv)(A) in accordance with § 86.1113–87(h): 0.38.

(2) Petroleum-fueled diesel heavy-duty engine particulate matter emission standard of 0.10 grams per brake horsepower-hour.

(i) For petroleum-fueled light heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(*1*) COC_{50}: $772.

(*2*) COC_{90}: $1,325.

(*3*) MC_{50}: $8,178 per gram per brake horsepower-hour.

(*4*) F: 1.2.

(B) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with § 86.1113–87(h): 0.081.

(ii) For petroleum-fueled medium heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(*1*) COC_{50}: $1,276.

(*2*) COC_{90}: $3,298.

(*3*) MC_{50}: $15,370 per gram per brake horsepower-hour.

(*4*) F: 1.2.

(B) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with § 86.1113–87(h): 0.098.

(iii) For petroleum-fueled heavy heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(*1*) COC_{50}: $2,105.

(*2*) COC_{90}: $6,978.

(*3*) MC_{50}: $30,070 per gram per brake horsepower-hour.

(*4*) F: 1.2.

(B) The following factor shall be used to calculate the engineering and development component of the NCP in accordance with § 86.1113-87(h): 0.083.

(g) Effective in the 1996 model year, NCPs will be available for the following emission standard:

(1) Light-duty truck 3 diesel-fueled vehicle at full useful life (as defined in § 86.094–2) particulate matter emission standard of 0.10 g/mi.

(i) The following values shall be used to calculate an NCP for the standard set forth in § 86.094–9(a)(1)(ii) in accordance with § 86.1113–87(a):

(A) COC_{50}: $441.

(B) COC_{90}: $1,471.

(C) MC_{50}: $14,700 per gram per mile.

(D) F: 1.2.

(ii) The following factor shall be used to calculate the engineering and development component of the NCP for the standard set forth in § 86.094–9(a)(1)(ii) in accordance with § 86.1113–87(h): 0.093.

(2) Light-duty truck 3 diesel-fueled vehicle at full useful life (as defined in § 86.094–2) oxides of nitrogen emission standard of 0.98 g/mi.

(i) The following values shall be used to calculate an NCP for the standard set forth in § 86.094–9(a)(1)(ii) in accordance with § 86.1113–87(a):

(A) COC_{50}: $654.

(B) COC_{90}: $779.

(C) MC_{50}: $908 per gram per mile.

(D) F: 1.2.

(ii) The following factor shall be used to calculate the engineering and development component of the NCP for the standard set forth in § 86.094–9(a)(1)(ii) in accordance with § 86.1113–87(h): 0.082.

(3) 1996 Urban Bus (as defined in § 86.094–2) particulate matter emission standard of 0.05 g/BHp-hr.

(i) The following values shall be used to calculate an NCP for the standard set forth in § 86.094–9(a)(1)(ii) in accordance with § 86.1113–87(a):

(A) COC_{50}: $576.

(B) COC_{90}: $6,569.

(C) MC_{50}: $28,800 per gram per brake horsepower-hour.

(D) F: 1.2.

(ii) The following factor shall be used to calculate the engineering and development component of the NCP for the standard set forth in § 86.094–9(a)(1)(ii) in accordance with § 86.1113–87(h): 0.500.

(h) Effective in the 1998 model year, NCPs will be available for the following emission standard:

(1) Petroleum-fueled diesel heavy-duty engine oxides of nitrogen standard of 4.0 grams per brake horsepower-hour.

(i) For petroleum-fueled light heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with § 86.1113–87(a):

(*1*) COC_{50}: $833.

(*2*) COC_{90}: $1,513.

(*3*) MC_{50}: $833 per gram per brake horsepower-hour.

(*4*) F: 1.2.

(B) The following factor shall be used to calculate the engineering and development component of the NCP for the standard set forth in §86.094–9(a)(1)(ii) in accordance with §86.1113–87(h): 0.039.

(ii) For petroleum-fueled medium heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with §86.1113–87(a):

(*1*) COC_{50}: $444.

(*2*) COC_{90}: $1,368.

(*3*) MC_{50}: $444 per gram per brake horsepower-hour.

(*4*) F: 1.2.

(B) The following factor shall be used to calculate the engineering and development component of the NCP for the standard set forth in §86.094–9(a)(1)(ii) in accordance with §86.1113–87(h): 0.043.

(iii) For petroleum-fueled heavy heavy-duty diesel engines:

(A) The following values shall be used to calculate an NCP in accordance with §86.1113–87(a):

(*1*) COC_{50}: $1,086.

(*2*) COC_{90}: $2,540.

(*3*) MC_{50}: $1,086 per gram per brake horsepower-hour

(*4*) F: 1.2.

(B) The following factor shall be used to calculate the engineering and development component of the NCP for the standard set forth in §86.094–9(a)(1)(ii) in accordance with §86.1113–87(h): 0.039.

(2) [Reserved]

[50 FR 53466, Dec. 31, 1985, as amended at 52 FR 47870, Dec. 16, 1987; 53 FR 43878, Oct. 31, 1988; 56 FR 64712, Dec. 12, 1991; 58 FR 15802, Mar. 24, 1993; 58 FR 68540, Dec. 28, 1993; 60 FR 33925, June 29, 1995; 61 FR 6949, 6953, Feb. 23, 1996]

§86.1106–87 Production compliance auditing.

For a model year in which upper limits for heavy-duty engine or heavy-duty vehicle emission standards for one or more exhaust pollutants are specified in §86.1105–87, a manufacturer may elect to conduct a Production Compliance Audit (PCA) for each engine or vehicle configuration satisfying the following conditions:

(a) Certification test results, pursuant to §86.082–23, exceed the emission standard for a particular pollutant but do not exceed the upper limit established for that pollutant. In that event, the manufacturer will be offered a qualified certificate of conformity allowing for the introduction into commerce of the specified engine family, *Provided,* That:

(1) The manufacturer must agree to conduct a PCA of those engines or vehicles;

(2) PCA testing must be conducted on the same configurations that exceeded the standard in certification. In lieu of that requirement, the Administrator may approve testing of a greater or lesser number of configurations provided the manufacturer agrees to pay the NCP determined from the CL of each tested configuration for that configuration and for other non-tested configurations that have similar emission characteristics. If an acceptable showing of similar emission characteristics is not made, the highest CL of the configurations tested will apply to all non-tested configurations exceeding the standard.

(3) The selection of engines or vehicles for PCA testing must be initiated no later than five (5) days after the start of assembly-line production of the specified engine or vehicle configuration, unless that period is extended by the Administrator;

(4) The manufacturer must agree:

(i) To pay the NCP amount calculated as a result of PCA testing on each engine or vehicle, unless the manufacturer successfully challenges the Administrator's determination of the compliance level or penalty calculation or both under §86.1115–87(c);

(ii) To recall any engines or vehicles introduced into commerce, without invoking the procedural requirements of section 207(c) of the Clean Air Act, if the compliance level for the engine or vehicle configuration of (a)(2) exceeds the upper limit as determined by the PCA;

(5) If the compliance level determined in the PCA is below the emission standard, no NCP will be offered, and all appropriate qualifications will be removed from the qualified certificate of conformity.

(b) An engine or vehicle configuration fails a Selective Enforcement Audit (SEA) under subpart K of 40 CFR part 86 with respect to the standard for

a particular pollutant but does not fail with respect to the upper limit established for that pollutant, and no NCP has been previously assessed for that configuration, *Provided*, That:

(1) The manufacturer must submit a written report to the Administrator within five (5) days after failure to pass the audit containing the following:

(i) A statement that the manufacturer does not intend, at that time, to make any engine and/or emission control system design changes that may remedy the nonconformity; and

(ii) A request from the manufacturer to conduct the PCA, including the date the testing will begin;

(2) Failure to submit the report within five (5) days after the SEA failure will result in the forfeiture of the NCP option, unless a satisfactory justification for the delay is provided to the Administrator;

(3) The selection of any required engines or vehicles for PCA testing must be initiated no later than ten (10) days after the SEA failure unless extended by the Administrator; otherwise, the manufacturer may forfeit the option to elect an NCP;

(4) PCA testing must be conducted on the same configuration that failed the SEA;

(5) Test results from the SEA, together with any additional test results required during the PCA, will be used in establishing a compliance level for the configuration pursuant to § 86.1112–87(a); and

(6) The manufacturer, upon approval by the Administrator to conduct a PCA on a failed SEA engine or vehicle configuration, must agree:

(i) To pay the NCP amount calculated as a result of PCA testing on each engine or vehicle introduced into commerce after the tenth day of the SEA failure, unless the manufacturer successfully challenges the Administrator's determination of the compliance level or penalty calculation or both under § 86.1115–87(c);

(ii) To recall any engines or vehicles introduced into commerce after the tenth day of the SEA failure, without invoking the procedural requirements of section 207(c) of the Clean Air Act, if the compliance level of the engine or vehicle configuration exceeds the upper limit as determined by the PCA.

(c) An engine or vehicle configuration, for which an NCP has been previously assessed for a particular pollutant, either passes an SEA with respect to the particular pollutant standard, fails an SEA with respect to the particular pollutant standard but not the previous compliance level, or fails an SEA with respect to the previous compliance level but not the associated upper limit, *Provided*, That:

(1) The manufacturer must submit a written statement to the Administrator within five (5) days of the conclusion of the SEA requesting a PCA, including the date the PCA testing will begin; otherwise, the manufacturer forfeits the option to establish a new compliance level;

(2) The selection of any required engines or vehicles for PCA testing must be initiated no later than ten (10) days after the conclusion of the SEA unless the period is extended by the Administrator; otherwise, the manufacturer forfeits the option to establish a new compliance level;

(3) PCA testing must be conducted on the same configuration tested during the SEA, and all conditions in the SEA test order must apply to the PCA;

(4) Test results for the SEA, together with any additional test results required during the PCA, will be used in establishing a new compliance level for the configuration pursuant to § 86.1112–87(a);

(5) The manufacturer must agree:

(i) To pay the NCP amount calculated as a result of PCA testing on each engine or vehicle introduced into commerce after the tenth day of the conclusion of the SEA, unless the manufacturer successfully challenges the Administrator's determination of the compliance level or penalty calculation or both under § 86.1115–87(c);

(ii) To recall any engines or vehicles introduced into commerce after the tenth day after the conclusion of the SEA, without invoking the procedural requirements of section 207(c) of the Clean Air Act, if the engine or vehicle configuration exceeds the upper limit as determined by the PCA;

(6) A previously assessed NCP will be terminated and no NCP will be established as a result of the new PCA if the compliance level is determined to be below the applicable emission standards.

(d) The implementation of a production running change that causes the emission level for a particular pollutant to be either above the emission standard but below the associated upper limit for a vehicle or engine configuration for which an NCP has not been previously assessed, or below the associated upper limit for a vehicle or engine configuration for which an NCP has been previously assessed, regardless of the previous compliance level. In that event, the manufacturer will be offered a qualified certificate of conformity allowing for the introduction into commerce of the engine or vehicle configuration resulting from the running change, *Provided,* That:

(1) The manufacturer must submit a written report to the Administrator outlining the reason for the running change and the date the manufacturer will begin PCA testing;

(2) The manufacturer must agree:

(i) To pay the NCP amount calculated as a result of PCA testing on each engine or vehicle, unless the manufacturer successfully challenges the Administrator's determination of compliance level or penalty calculation or both under §86.1115–87(c);

(ii) To recall any engines or vehicles introduced into commerce, without invoking the procedural requirements of section 207(c) of the Clean Air Act, if the engine or vehicle configuration exceeds the upper limit as determined by the PCA;

(3) The selection of engines or vehicles for PCA testing must be initiated no later than five (5) days after the start of assembly line production of the engine or vehicle configuration resulting from the running change unless that period is extended by the Administrator; and

(4) If the compliance level is determined to be below the applicable emission standard, a previously assessed NCP will be terminated, an NCP will not be established as a result of the PCA testing, and all qualifications will be removed from the qualified certificate of conformity.

(e) The following requirements are applicable to each PCA under this subpart.

(1) The manufacturer shall make the following documents available to EPA Enforcement Officers upon request;

(i) A properly filed and current application for certification, following the format prescribed by the EPA for the appropriate model year; and

(ii) A copy of the shop manual and dealer service bulletins for the configurations being tested.

(2) Only one mechanic at a time per engine or vehicle shall make authorized checks, adjustments, or repairs, unless a particular check, adjustment, or repair requires a second mechanic as indicated in the shop manual or dealer service bulletins.

(3) A mechanic shall not perform any check, adjustment, or repair without an Enforcement Officer present unless otherwise authorized.

(4) The manufacturer shall utilize only those tools and test equipment utilized by its dealers or those dealers using its engines when performing authorized checks, adjustments, or repairs.

[50 FR 35388, Aug. 30, 1985, as amended at 58 FR 68540, Dec. 28, 1993]

§86.1107–87 Testing by the Administrator.

(a) The Administrator may require that engines or vehicles of a specified configuration be selected in a manner consistent with the requirements of §86.1110–87 and submitted to him at such place as he may designate for the purpose of conducting emission tests in accordance with §86.1111–87 to determine whether engines or vehicles manufactured by the manufacturer conform with the regulations of this subpart.

(b)(1) Whenever the Administrator conducts a test on a test engine or vehicle or the Administrator and manufacturer each conduct a test on the same test engine or vehicle, the results of the Administrator's test will comprise the official data for that engine or vehicle.

(2) Whenever the manufacturer conducts all tests on a test engine or vehicle, the manufacturer's test data will be accepted as the official data, provided that if the Administrator makes a determination based on testing under paragraph (a) of this section that there is a substantial lack of agreement between the manufacturer's test results and the Administrator's test results, no manufacturer's test data from the manufacturer's test facility will be accepted for purposes of this subpart.

(c) If the Administrator determines that testing conducted under paragraph (a) of this section demonstrates a lack of agreement under paragraph (b)(2) of this section, the Administrator shall:

(1) Notify the manufacturer in writing of his determination that the manufacturer's test facility is inappropriate for conducting the tests required by this subpart and the reasons therefore; and

(2) Reinstate any manufacturer's data only upon a showing by the manufacturer that the data acquired under paragraph (a) of this section was erroneous and the manufacturer's data was correct.

(d) The manufacturer may request in writing that the Administrator reconsider his determination in paragraph (b)(2) of this section based on data or information which indicates that changes have been made to the test facility and that these changes have resolved the reasons for disqualification.

§ 86.1108–87 Maintenance of records.

(a) The manufacturer of any new gasoline-fueled or diesel heavy-duty engine or heavy-duty vehicle subject to any of the provisions of this subpart shall establish, maintain, and retain the following adequately organized and indexed records:

(1) *General records.* A description of all equipment used to test engines or vehicles in accordance with § 86.1111–87, pursuant to PCA testing under this subpart, specifically;

(i) If testing heavy-duty gasoline engines, the equipment requirements specified in §§ 86.1306–84 and 86.1506–84 of this part.

(ii) If testing heavy-duty diesel engines, the equipment requirements specified in §§ 86.1306–84, 86.1506–84, 86.879–6, 86.879–8 and 86.879–9 of this part;

(iii) If testing light-duty gasoline-fueled trucks, the equipment requirements specified in §§ 86.106 (excluding all references to particulate emission testing) and 86.1506–84 of this part; and

(iv) If testing light-duty diesel trucks, the equipment requirements specified in § 86.106 (excluding all references to evaporative emission testing) of this part.

(2) *Individual records.* These records pertain to each Production Compliance Audit conducted pursuant to this subpart.

(i) The date, time, and location of each test;

(ii) The number of hours of service accumulated on the engine or the number of miles on the vehicle when the test began and ended;

(iii) The names of all supervisory personnel involved in the conduct of the Production Compliance Audit;

(iv) A record and description of any repair performed, giving the date and time of the repair, the reason for it, the person authorizing it, and the names of all personnel involved in the supervision and performance of the repair;

(v) The date when the engine or vehicle was shipped from the assembly plant or associated storage facility and when it was received at the testing facility;

(vi) A complete record of all emission tests performed pursuant to this subpart (except tests performed by EPA directly), including all individual worksheets and/or other documentation relating to each test, or exact copies thereof, specifically—

(A) If testing heavy-duty gasoline engines, the record requirements specified in §§ 86.1342–84 and 86.1542–84 of this part;

(B) If testing heavy-duty diesel engines, the record requirements specified in §§ 86.1342–84, 86.1542–84, and § 86.879–10; (§ 86.337–79 for subpart D testing only).

(C) If testing light-duty gasoline fueled trucks, the record requirements specified in §§ 86.142 (excluding all references to diesel vehicles) and 86.1542–84; and

(D) If the testing light-duty diesel trucks, the record requirements specified in §86.142; and

(vii) A brief description of any significant Production Compliance Audit events commencing with the test engine or vehicle selection process, but not described by any subparagraph under paragraph (a)(2) of this section, including such extraordinary events as engine damage during shipment or vehicle accident.

(3) The manufacturer shall record the test equipment description, pursuant to paragraph (a)(1) of this section, for each test cell that was used to perform emission testing under this subpart.

(b) The manufacturer shall retain all records required to be maintained under this subpart for a period of six (6) years after completion of all testing. Records may be retained as hard copy or reduced to microfilm, punch cards, etc., depending upon the manufacturer's record retention procedure, provided that in every case all the information contained in the hard copy is retained.

§86.1109–87 Entry and access.

(a) To allow the Administrator to determine whether a manufacturer is complying with the provisions of this subpart, EPA Enforcement Officers are authorized to enter any of the following (during operating hours and upon presentation of credentials):

(1) Any facility where any engine or vehicle to be introduced into commerce or any emission related component is manufactured, assembled, or stored;

(2) Any facility where any tests conducted pursuant to a PCA request or any procedures or activities connected with these tests are or were performed;

(3) Any facility where any engine or vehicle which is being tested, was tested, or will be tested is present; and

(4) Any facility where any record or other document relating to any of the above is located.

(b) Upon admission to any facility referred to in paragraph (a) of this section, EPA Enforcement Officers are authorized to perform the following inspection-related activities:

(1) To inspect and monitor any aspects of engine or vehicle manufacture, assembly, storage, testing and other procedures, and the facilities in which these procedures are conducted.

(2) To inspect and monitor any aspect of engine or vehicle test procedures or activities, including, but not limited to, monitoring engine or vehicle selection, preparation, service or mileage accumulation, preconditioning, repairs, emission test cycles, and maintenance; and to verify calibration of test equipment;

(3) To inspect and make copies of any records or documents related to the assembly, storage, selection and testing of an engine or vehicle; and

(4) To inspect and photograph any part or aspect of any engine or vehicle and any component used in the assembly thereof that is reasonably related to the purpose of the entry.

(c) EPA Enforcement Officers are authorized to obtain reasonable assistance without cost from those in charge of a facility to help them perform any function listed in this subpart and are authorized to request the manufacturer conducting the PCA to make arrangement with those in charge of a facility operated for its benefit to furnish reasonable assistance without cost to EPA, whether or not the manufacturer controls the facility.

(d) EPA Enforcement Officers are authorized to seek a warrant or court order authorizing the EPA Enforcement Officers to conduct activities related to entry and access as authorized in this section, as appropriate, to execute the functions specified in this section. EPA Enforcement Officers may proceed ex parte to obtain a warrant whether or not the Enforcement Officers first attempted to seek permission of the manufacturer conducting the PCA or the party in charge of the facilities in question to conduct activities related to entry and access as authorized in this section.

(e) A manufacturer that conducts a PCA shall permit EPA Enforcement Officers who present a warrant or court order as described in paragraph (d) of this section to conduct activities related to entry and access as authorized in this section and as described in the warrant or court order. The manufacturer shall cause those in charge of its facility or a facility operated for its

benefit to permit EPA Enforcement Officers to conduct activities related to entry and access as authorized in this section pursuant to a warrant or court order whether or not the manufacturer controls the facility. In the absence of such a warrant or court order, EPA Enforcement Officers may conduct activities related to entry and access as authorized in this section only upon the consent of the manufacturer or the party in charge of the facilities in question.

(f) It is not a violation of this part or the Clean Air Act for any person to refuse to permit EPA Enforcement Officers to conduct activities related to entry and access as authorized in this section without a warrant or court order.

(g) A manufacturer is responsible for locating its foreign testing and manufacturing facilities in jurisdictions in which local foreign law does not prohibit EPA Enforcement Officers from conducting the entry and access activities specified in this section. EPA will not attempt to make any inspections which it has been informed that local foreign law prohibits.

(h) For purposes of this section, the following definitions are applicable:

(1) *Presentation of Credentials* means display of the document designating a person as an EPA Enforcement Officer.

(2) Where engine or vehicle storage areas or facilities are concerned, *operating hours* means all times during which personnel other than custodial personnel are at work in the vicinity of the area or facility and have access to it.

(3) Where facilities or areas other than those covered by paragraph (h)(2) of this section are concerned, *operating hours* means all times during which an assembly line is in operation, engine or vehicle assembly is taking place, testing repair, service accumulation, preparation or compilation of records is taking place, or any other procedure or activity related to engine or vehicle manufacture, assembly or testing is being carried out in a facility.

(4) *Reasonable assistance* includes, but is not limited to, clerical, copying, interpreting and translating services, and making personnel of the facility being inspected available during their working hours on an EPA Enforcement Officer's request to inform the EPA Enforcement Officer of how the facility operates and to answer his or her questions. Any employee whom an EPA Enforcement Officer requests the manufacturer to cause to appear for questioning will be entitled to be accompanied, represented and advised by counsel.

§ 86.1110–87 Sample selection.

(a) Engines or vehicles comprising a test sample which are required to be tested pursuant to a PCA in accordance with this subpart will be selected at the location and in the manner specified by EPA. If a manufacturer determines that the test engines or vehicles cannot be selected in the manner specified by EPA, an alternative selection procedure may be employed, provided that the manufacturer requests approval of the alternative procedure in advance of the start of test sample selection and that the Administrator approves the procedure.

(b) The manufacturer shall have assembled the test engines or vehicles of the configuration selected for testing using its normal mass production processes for engines or vehicles to be distributed into commerce. In the case of heavy-duty engines, if the test engines are selected at a location where they do not have their operational and emission control systems installed, EPA will specify the manner and location for selection of components to complete assembly of the engines. The manufacturer shall assemble these components onto the test engines using normal assembly and quality control procedures as documented by the manufacturer.

(c) No quality control, testing, or assembly procedures will be used on the completed test engine or vehicle or any portion thereof, including parts and subassemblies, that will not be used during the production and assembly of all other engines or vehicles of that configuration.

(d) The EPA Enforcement Officers may specify that they, rather than the manufacturer, will select the test engines or vehicles.

(e) The order in which test engines or vehicles are selected determines the

order in which test results are to be used in applying the PCA testing plan in accordance with §86.1112–87.

(f) The manufacturer shall keep on hand all engines or vehicles comprising the test sample until such time as a compliance level is determined in accordance with §86.1112–87(a) except that the manufacturer may ship any tested engine or vehicle which has not failed in accordance with §86.1112–87(f)(1). However, once the manufacturer ships any test engine or vehicle, it relinquishes the prerogative to conduct retests as provided in §86.1111–87(i).

§86.1111–87 Test procedures for PCA testing.

(a)(1) For heavy-duty engines, the prescribed test procedure for PCA testing is the Federal Test Procedure as described in subparts N, I, and P of this part.

(2) For heavy-duty vehicles, the prescribed test procedure for PCA testing is described in subpart M of this part.

(3) For light-duty trucks, the prescribed test procedure for PCA testing is the Federal Test Procedure as described in subparts B and P of this part.

(4) During the testing of heavy-duty diesel engines, the manufacturer shall decide for each engine, prior to the start of the initial cold cycle, whether the measurement of background particulate is required for the cold and hot cycles to be valid. The manufacturer may choose to have different requirements for the cold and hot cycles. If a manufacturer chooses to require the measurement of background particulate, failure to measure background particulate shall void the test cycle regardless of the test results. If a test cycle is void, the manufacturer shall retest using the same validity requirements of the initial test.

(5) When testing light-duty trucks, the following exceptions to the test procedures in subpart B are applicable:

(i) The manufacturer may use gasoline test fuel meeting the specifications of paragraph (a) of §86.113 for mileage accumulation. Otherwise, the manufacturer may use fuels other than those specified in this section only with advance approval of the Administrator.

(ii) The manufacturer may measure the temperature of the test fuel at other than the approximate midvolume of the fuel tank, as specified in paragraph (a) of §86.131, and may drain the test fuel from other than the lowest point of the fuel tank, as specified in paragraph (b) of §86.131, with the advance approval of the Administrator.

(iii) The manufacturer may perform additional preconditioning on PCA test vehicles other than the preconditioning specified in §86.132 only if the additional preconditioning has been performed on certification test vehicles of the same configuration.

(iv) The manufacturer shall perform the heat build procedure 11 to 34 hours following vehicle preconditioning rather than according to the time period specified in paragraph (a) of §86.133.

(v) The manufacturer may substitute slave tires for the drive wheel tires on the vehicle as specified in paragraph (e) of §86.135, provided that the slave tires are the same size as the drive wheel tires.

(vi) The cold start exhaust emission test described in §86.137 shall follow the heat build procedure described in §86.133 by not more than one hour.

(vii) In performing exhaust sample analysis under §86.140:

(A) When testing diesel vehicles, the manufacturer shall allow a minimum of 20 minutes warm-up for the HC analyzer, and a minimum of 2 hours warm-up for the CO, CO_2 and NO_X analyzers. [Power is normally left on for infrared and chemiluminescent analyzers. When not in use, the chopper motors of the infrared analyzers are turned off and the phototube high voltage supply to the chemiluminescent analyzers is placed in the standby position.]

(B) The manufacturer shall exercise care to prevent moisture from condensing in the sample collection bags.

(viii) The manufacturer need not comply with §86.142, since the records required therein are provided under other provisions of this subpart.

(ix) In addition to the requirements of subpart B of this part, the manufacturer shall prepare gasoline-fueled vehicles as follows prior to exhaust emission testing:

(A) The manufacturer shall inspect the fuel system to insure the absence

of any leaks of liquid or vapor to the atmosphere by applying a pressure of 14.5 ± 0.5 inches of water to the fuel system, allowing the pressure to stabilize, and isolating the fuel system from the pressure source. Following isolation of the fuel system, pressure must not drop more than 2.0 inches of water in 5 minutes. If required, the manufacturer shall perform corrective action in accordance with paragraph (d) of this section.

(B) When performing this pressure check, the manufacturer shall exercise care to neither purge nor load the evaporative emission control system.

(C) The manufacturer shall not modify the test vehicle's evaporative emission control system by component addition, deletion, or substitution, except to comply with paragraph (a)(4)(ii) of this section if approved in advance by the Administrator.

(b)(1) The manufacturer shall not adjust, repair, prepare, or modify the engines or vehicles selected for testing and shall not perform any emission tests on engines or vehicles selected for testing pursuant to a PCA request unless the adjustment, repair, preparation, modification, or tests are documented in the manufacturer's engine or vehicle assembly and inspection procedures and are actually performed on all engines or vehicles produced or unless these adjustments or tests are required or permitted under this subpart or are approved in advance by the Administrator.

(2) For 1984 and later model years the Administrator may adjust or cause to be adjusted any engine parameter which the Administrator has determined to be subject to adjustment for certification, Selective Enforcement Audit and Production. Compliance Audit testing in accordance with § 86.084–22(e)(1), to any setting within the physically adjustable range of that parameter, as determined by the Administrator in accordance with § 86.084–2(e)(3)(ii), prior to the performance of any tests. However, if the idle speed parameter is one which the Administrator has determined to be subject to adjustment, the Administrator shall not adjust it to any setting which causes a lower engine idle speed than would have been possible within the physically adjustable range of the idle speed parameter if the manufacturer had accumulated 125 hours of service on the engine or 4,000 miles on the vehicle under paragraph (c) of this section, all other parameters being identically adjusted for the purpose of the comparison. The manufacturer may be requested to supply information to establish such an alternative minimum idle speed. The Administrator, in making or specifying these adjustments, may consider the effect of the deviation from the manufacturer's recommended setting on emissions performance characteristics as well as the likelihood that similar settings will occur on in-use heavy-duty engines or light-duty trucks. In determining likelihood, the Administrator may consider factors such as, but not limited to, the effect of the adjustment on engine or vehicle performance characteristics and surveillance information from similar in-use engines or vehicles.

(c) Prior to performing emission testing on a PCA test engine, the manufacturer may accumulate on each engine a number of hours of service equal to the greater of 125 hours or the number of hours the manufacturer accumulated during certification on the emission-data engine corresponding to the configuration tested during PCA. Prior to performing emission testing on a PCA test vehicle, the manufacturer may accumulate a number of miles equal to the greater of 4,000 miles or the number of miles the manufacturer accumulated during certification on the emission-data vehicle corresponding to the configuration tested during PCA. Service or mileage accumulation may be performed in any manner the manufacturer desires.

(d) No maintenance shall be performed on test engines or vehicles after selection for testing nor will any test engine or vehicle substitution or replacement be allowed, unless requested of and approved by the Administrator in advance of the performance of any maintenance or engine or vehicle substitution.

(e) The manufacturer shall expeditiously ship test engines or vehicles from the point of selection to the test facility or other location to meet any other requirements of this subpart. If

the test facility is not located at or in close proximity to the point of selection, the manufacturer shall assure that test engines or vehicles arrive at the test facility within 24 hours of selection, except that the Administrator may approve more time based upon a request by the manufacturer accompanied by a satisfactory justification.

(f) If an engine or vehicle cannot complete the service or mileage accumulation or emission tests because of engine or vehicle malfunction, the manufacturer may request that the Administrator authorize the repair of the engine or vehicle. If the engine or vehicle cannot be repaired expeditiously, EPA may delete it from the test sequence.

(g)(1) Heavy-duty engine manufacturers with projected sales bound for the United States market for that year of 30,000 or greater, as made in their respective Applications for Certification, shall complete emission testing at their testing facility on a minimum of two engines per 24 hour period, including voided tests.

(2) Heavy-duty engine manufacturers with projected sales bound for the United States market for that year of less than 30,000, as made in their respective Applications for Certification, Shall complete emission testing at one engine per 24 hour period, including voided tests.

(3) Light-duty truck manufacturers shall complete emission testing on a minimum of four vehicles per 24 hour period, including voided tests.

(4) The Administrator may approve a longer period of time for conducting emission tests based upon a request by a manufacturer accompanied by a satisfactory justification.

(h) The manufacturer shall perform test engine or vehicle selection, shipping, preparation, service or mileage accumulation, and testing in such a manner as to insure that the audit is performed in an expeditious manner.

(i) The manufacturer may retest any engines or vehicles tested during a Production Compliance Audit once a compliance level has been established in accordance with §86.1112–87 based on the first test on each engine or vehicle. The Administrator may approve retesting at other times based upon a request by the manufacturer accompanied by a satisfactory justification. The manufacturer may test each engine or vehicle a total of three times. The manufacturer shall test each engine or vehicle the same number of times. The manufacturer may accumulate additional service or mileage before conducting a retest, subject to the provisions of paragraph (c) of this section.

[50 FR 35388, Aug. 30, 1985, as amended at 62 FR 47123, Sept. 5, 1997]

§86.1112–87 Determining the compliance level and reporting of test results.

(a) A manufacturer that has elected to conduct a PCA in accordance with §86.1106–87 may establish the compliance level for a pollutant for any engine or vehicle configuration by using the primary PCA sampling plan or either of two optional reduced PCA sampling plans (the fixed reduced sampling plan or the sequential reduced sampling plan) described below. A manufacturer that uses either of the two optional reduced PCA sampling plans may elect to continue testing and establish a compliance level under the primary PCA sampling plan.

(1) A manufacturer that elects to conduct a PCA for a pollutant using the primary PCA sampling plan shall:

(i) Conduct emission tests on 24 engines or vehicles in accordance with §86.1111–87 for the pollutants for which the PCA was initiated. If the PCA follows an SEA failure, the number of additional tests conducted shall be the difference between 24 and the number of engines or vehicles tested in the SEA. If 24 or more engines or vehicles were tested in the SEA, no additional tests shall be conducted; and

(ii) Rank the final deteriorated test results, as defined by paragraph (e) of this section, obtained for that pollutant in order from the lowest to the highest value. If the PCA follows an SEA failure, all SEA test results for that pollutant shall be included in this ranking.

(iii) The compliance level for that pollutant is the final deteriorated test result in the sequence determined from table 1 of appendix XII of these regulations.

(2) A manufacturer that elects to conduct a PCA for a pollutant using the fixed reduced PCA sampling plan shall:

(i) Select a sample size between 3 and 23 engines or vehicles. If the PCA follows an SEA failure, the sample size selected cannot be less than the number of engines or vehicles tested during the SEA; and

(ii) Conduct emission tests on the selected sample in accordance with §86.1111–87 for the pollutants for which the PCA was initiated.

(iii) The compliance level for the pollutant is the result of the following equation, using the test results obtained in paragraph (a)(2)(ii) of this section and all SEA test results for that pollutant if the PCA follows an SEA failure:

$$CL = X + Ks$$

where:

CL=The compliance level.
X=The mean of the final deteriorated test results, as defined by paragraph (e) of this section.
K=A value that depends on the size of the test sample. See table 2 of appendix XII of this part for the value of K that corresponds to the size of the test sample.
s=The sample standard deviation.

The compliance level is rounded to the same number of significant figures contained in the applicable standard in accordance with ASTM E29–67.

(3) A manufacturer that elects to conduct a PCA for a pollutant using the sequential reduced PCA sampling plan shall perform the following:

(i) Select a sample size of 4, 8, 12, 16 or 20 engines or vehicles. If the PCA follows an SEA failure, the sample size selected cannot be less than the number of engines or vehicles tested during the SEA.

(ii) Conduct emission tests on the selected sample in accordance with §86.1111–87 for the pollutants for which the PCA was initiated.

(iii) The compliance level for the pollutant is the result of the following equation, using the test results obtained in (a)(3)(ii) and all SEA test results for that pollutant if the PCA follows an SEA failure:

$$CL = X + Ks$$

where:

CL=The compliance level.
X=The mean of the final deteriorated test results, as defined by paragraph (e) of this section.
K=A value that depends on the size of the test sample. See table 3 of appendix XII of this part for the value of K that corresponds to the size of the test sample.
s=The sample standard deviation.

The compliance level is rounded to the same number of significant figures contained in the applicable standard in accordance with ASTM E29–67.

(iv) After calculating a compliance level in accordance with paragraph (a)(3)(iii) of this section, a manufacturer may elect to increase the sample size by 4 engines or vehicles, or a multiple thereof, up to the maximum, including SEA engines or vehicles if any, of 20. Upon that election, the manufacturer shall add the additional engines or vehicles to the sample and perform paragraphs (a)(3)(ii) and (a)(3)(iii) of this section. This election may be repeated if appropriate. A compliance level determined under this election shall replace a previously determined compliance level.

(b) A fail decision is reached with respect to the upper limit when the compliance level determined in paragraph (a) of this section exceeds the applicable upper limit.

(c) Initial test results are calculated following the Federal Test Procedure specified in §86.1111–87(a).

(d) Final test results are calculated by summing the initial test results derived in paragraph (c) of this section for each test engine or vehicle, dividing by the number of tests conducted on the engine or vehicle, and rounding in accordance with ASTM E29–67 to the same number of decimal places contained in the applicable standard expressed to one additional significant figure.

(e) Final deteriorated test results. (1) The final deteriorated test results for each heavy-duty engine or light-duty truck tested according to subpart B, I, N, or P of this part are calculated by applying the final test results by the appropriate deterioration factor, derived from the certification process for the engine family control system combination and model year for the selected configuration to which the test

engine or vehicle belongs. If the deterioration factor computed during the certification process is multiplicative and it is less than one, that deterioration factor will be one. If the deterioration factor computed during the certification process is additive and it is less than zero, that deterioration factor will be zero.

(2) The final deteriorated test results are rounded to the same number of significant figures contained in the applicable standard in accordance with ASTM E29–67.

(f) A failed engine or vehicle is one whose final deteriorated test results, for one or more of the applicable exhaust pollutants, exceed:

(1) The applicable emission standard, or

(2) The compliance level established in paragraph (b) of this section.

(g) Within five working days after completion of PCA testing of all engines or vehicles, the manufacturer shall submit to the Administrator a report which includes the following information:

(1) The location and description of the manufacturer's emission test facilities which were utilized to conduct testing reported pursuant to this section;

(2) The applicable standards against which the engines or vehicles were tested;

(3) Deterioration factors for the engine family to which the selected configuration belongs;

(4) A description of the engine or vehicle and any emission-related component selection method used;

(5) For each test conducted:

(i) Test engine or vehicle description, including;

(A) Configuration and engine family identification,

(B) Year, make and build date,

(C) Engine or vehicle identification number, and

(D) Number of hours of service accumulated on engine or number of miles on vehicle prior to testing;

(ii) Location where service or mileage accumulation was conducted and description of accumulation procedure and schedule;

(iii) Test number, date, initial test results before and after rounding, final test results and final deteriorated test results for all emission tests, whether valid or invalid, and the reason for invalidation, if applicable;

(iv) A complete description of any modification, repair, preparation, maintenance, and/or testing which was performed on the test engine or vehicle and has not been reported pursuant to any other paragraph of this subpart and will not be performed on all other production engines or vehicles; and

(v) Any other information the Administrator may request relevant to the determination as to whether the new heavy-duty engines or heavy-duty vehicles being manufactured by the manufacturer do in fact conform with the regulations of this subpart; and

(6) The following statement and endorsement:

This report is submitted pursuant to section 206 of the Clean Air Act. This Production Compliance Audit was conducted in complete conformance with all applicable regulations under 40 CFR part 86 et seq. All data and information reported herein is, to the best of

(Company Name) 's knowledge, true and accurate. I am aware of the penalties associated with violations of the Clean Air Act and the regulations thereunder.

(Authorized Company Representative)

§86.1113–87 Calculation and payment of penalty.

(a) The NCP for each engine or vehicle for which a compliance level has been determined under §86.1112–87 is calculated according to the formula in paragraph (a)(1) or (a)(2) of this section depending on the value of the compliance level. Each formula contains an annual adjustment factor (AAF_i) which is defined in paragraph (a)(3) of this section. Other terms in the formulas are defined in paragraph (a)(4) of this section.

(1) If the compliance level (CL) is greater than the standard and less than or equal to X (e.g., point CL_1 in figure 1), then:

ER06OC93.111

where:

$PR_1 = (F)(MC_{50})$

(2) If the compliance level is greater than X and less than or equal to the upper limit as determined by § 86.1104–87 (e.g., point CL_2 in figure 1), then:

ER06OC93.112

where:

ER06OC93.113

(3) AAF_i has the following values:

(i) If $frac_{i-1} = 0$, then $AAF_i = 1 = I_{i-1}$
(ii) If $frac_{i-1} > 0$, then:

ER06OC93.114

ER06OC93.183

If $frac_{i-1} > 0.50$, then $frac_{i-1}$ will be set equal to 0.50.

(iii) $AAF_1 = 1$

(iv) In calculating the NCP for year n, the value $frac_{i-1}$ for i=n will include actual NCP usage through March 31 of model year n–1 and EPA's estimate of additional usage for the remainder of model year n-1 using manufacturer input. All manufacturers using NCPs must report by subclass actual NCP and non-NCP production numbers through March 31, an estimate of NCP and non-NCP production for the remainder of the model year, and the previous year's actual NCP and non-NCP production to EPA no later than April 30 of the model year. If EPA is unable

to obtain similar information from manufacturers not using NCPs, EPA will use projected sales data from the manufacturers' application for certification in computing the total production of the subclass and the $frac_{i-1}$. The value of $frac_{i-1}$ will be corrected to reflect actual year-end usage of NCPs and a corrected AAF will be used to establish NCPs in future years. The correction of previous year's AAF will not affect the previous year's penalty.

(4) The terms in the above formulas have the following meanings and values, which may be determined separately for each subclass and pollutant for which an NCP is offered. The production of Federal and California designated engines or vehicles shall be combined for the purpose of this section in calculating the NCP for each engine or vehicle.

ER06OC93.116

i=An index representing a year. It represents the same year for both Federal and California designated engines or vehicles of the same production model year.

n=Index representing the number of model years for which the NCP has been available for an engine or vehicle subclass (i.e., n=1 for the first year that the NCP is available, and so on until n=n for the nth year that the NCP is available). The factor ''n'' is based on the model year the NCP is first available, as specified in section 86.1105–87 for the engine or vehicle subclass and pollutant for both Federal and California designated engines and vehicles.

COC_{50}=Estimate of the average total incremental cost to comply with the standard relative to complying with the upper limit.

COC_{90}=Estimate of the 90th percentile total incremental cost to comply with the standard relative to complying with the upper limit.

MC_{50}=Estimate of the average marginal cost of compliance (dollars per emission unit) with the standard.

F=Factor used to estimate the 90th percentile marginal cost based on the average marginal cost (the minimum value of F is 1.1, the maximum value of F is 1.3).

AAF_i=Annual adjustment factor for year i, $frac_{i-1}$=Fraction of engines or vehicles of a subclass using NCPs in previous year (year i-1).

A_i=Usage adjustment factor in year i: A_i=0.10 for i=2; A_i=0.08 for i<2.

I_i=Percentage increase in overall consumer price index in year i.

(5) The values of COC_{50}, COC_{90}, MC_{50} and F will be determined for each applicable subclass by EPA based on the cost data used by EPA in setting the applicable emission standard. However, where the rulemaking to establish a specific NCP occurs after the rulemaking to establish the standard, EPA may augment the data base used to establish the standard by including the best cost and emission performance data available to EPA during the specific NCP rulemaking.

(6) In calculating the NCP, appropriate values of the following predefined terms should be used: CL, S, UL, F, and A_i. For all other terms, unrounded values of at least five figures beyond the decimal point should be used in calculations leading up to

NCP_n=NCP for year n for each applicable engine or vehicle

CL=Compliance level for year n for applicable engines or vehicles

S=Emission standard

UL=Upper limit as determined by section 86.1104–87, except that, if the upper limit is determined by section 86.1104–87(c), the value of UL in paragraph (a)(2) of this section shall be the prior emission standard for that pollutant.

UL′=Upper limit as determined by section 86.1104–87(c). This value is not used in the above formulas.

X=Compliance level above the standard at which NCP_1 equals COC_{50}

ER06OC93.115

PR_1=Penalty rate when CL≤ X

PR_2=Penalty rate when X< CL≤ applicable upper limit

the penalty amount. Any NCP calculated under paragraph (a) of this section will be rounded to the nearest dollar in accordance with ASTM E29–67.

(b) The NCP determined in paragraph (a) of this section is assessed against all those engines or vehicles of the nonconforming configuration or engine family produced at all assembly plants and distributed into commerce—

(1) Since the beginning of the model year in the case of a certification failure described by § 86.1106–87(a).

(2) Beginning ten days after an SEA failure described by § 86.1106–87 (b) or (c).

(3) Following implementation of a production running change described by § 86.1106–87(d).

(c) The NCP will continue to be assessed during the model year, until such time, if any, that the configuration or engine family is brought into conformance with applicable emission standards.

(d) A manufacturer may carry over an NCP from a model year to the next model year. There is no limit to the number of years that carryover can continue. The amount of the penalty will increase each year according to paragraph (a) of this section.

(e) The Administrator shall notify the manufacturer in writing of the nonconformance penalty established under paragraph (a) of this section after the completion of the PCA under § 86.1112–87.

(f) A manufacturer may request a hearing under § 86.1115–87 as to whether the compliance level (including a compliance level in excess of the upper limit) was determined in accordance with the procedures in § 86.1112–87(a) or whether the nonconformance penalty was calculated in accordance with the procedures in § 86.1113–87(a). If a nonconformance penalty has been established, such hearing must be requested within fifteen (15) days or such other period as may be allowed by the Administrator after the notification of the nonconformance penalty. If a manufacturer wishes to challenge a compliance level in excess of the upper limit, he must request a hearing within fifteen (15) days or such other period as may be allowed by the Administrator after the completion of the Production Compliance Audit.

(g)(1) Except as provided in paragraph (g)(2) of this section, the nonconformance penalty or penalties assessed under this subpart must be paid as follows:

(i) By the quarterly due dates, i.e., within 30 days of the end of each calendar quarter (March 31, June 30, September 30 and December 31), or according to such other payment schedule as the Administrator may approve pursuant to a manufacturer's request, for all nonconforming engines or vehicles produced by a manufacturer in accordance with paragraph (b) of this section and distributed into commerce for that quarter.

(ii) The penalty shall be payable to U.S. Environmental Protection Agency, NCP Fund, P.O. Box 360277M, Pittsburgh, PA 15251.

(2) When a manufacturer has requested a hearing under § 86.1115–87, it must pay the nonconformance penalty, and any interest, within ten days after the Presiding Officer renders his decision, unless the manufacturer first files a notice of intention to appeal to the Administrator pursuant to § 86.1115–87(t)(1), or, if an appeal of the Presiding Officer's decision is taken, within ten days after the Administrator renders his decision, unless the manufacturer first files a petition for judicial review.

(3) A manufacturer making payment under paragraph (g)(1) or (g)(2) of this section shall submit the following information by each quarterly due date to: Director, Manufacturers Operations Division, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. This information shall be submitted even if a manufacturer has no NCP production in a given quarter.

(i) Corporate identification, identification and quantity of engines or vehicles subject to the NCP, certificate identification (number and date), NCP payment calculations and interest payment calculations, if applicable.

(ii) The following statement and endorsement:

This information is submitted pursuant to section 206 of the Clean Air Act. All information reported herein is, to the best of

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(Company name)

knowledge, true and accurate. I am aware of the penalties associated with violations of the Clean Air Act and the regulations thereunder.

(Authorized Company Representative)

(4) The Administrator may verify the production figures or other documentation submitted under paragraph (g)(3) of this section.

(5)(i) Interest shall be assessed on any nonconformance penalty for which payment has been withheld under §86.113–87(g) (1) or (2). Interest shall be calculated from the due date for the first quarterly NCP payment, as determined under §86.1113–87(g)(1), until either the date on which the Presiding Officer or the Administrator renders the final decision of the Agency under §86.1115–87 or the date when an alternate payment schedule (approved pursuant to §86.1113–87(g)(1)) ends.

(ii) The combined principal plus interest on each quarterly NCP payment withheld pursuant to §86.1113–87(g) (1) or (2) shall be calculated according to the formula:

$QNCP(1 = R).25n$

where:

QNCP=the quarterly NCP payment

R=the interest rate applicable to that quarter

n=the number of quarters for which the quarterly NCP payment is outstanding.

(iii) The number of quarters for which payment is outstanding for purposes of this paragraph shall be the number of quarterly NCP payment due dates, as determined under §86.1113–87(g)(1), which have elapsed throughout the duration of a hearing request, or alternate payment schedule.

(iv) The interest rate applicable to a quarter for purposes of this paragraph shall be the rate published by the Secretary of the Treasury pursuant to the Debt Collection Act of 1982 and effective on the date on which the NCP payment was originally due.

(6) A manufacturer will be refunded an overpayment, or be permitted to offset an overpayment by withholding a future payment, if approved in advance by the Administrator. The government shall pay no interest on overpayments.

(h) A manufacturer that certifies as a replacement for the nonconforming configuration, a configuration that is in conformance with applicable standards, and that performs a production compliance audit (PCA) in accordance with §86.1112–87(a) that results in a compliance level below the applicable standard, will be eligible to receive a refund of a portion of the engineering and development component of the penalty. The engineering and development component will be determined by multiplying the base penalty amount by the engineering and development factor for the appropriate subclass and pollutant in §86.1105–87. The amount refunded will depend on the model year in which the certification and PCA take place. In cases where payment of penalties have been waived by EPA in accordance with paragraph (g)(1)(iii) of this section, EPA will refund a portion of the engineering and development component. The proportionate refund to be paid by EPA will be based on the proportion of vehicles or engines of the nonconforming configuration for which NCPs were paid to EPA. The refund is calculated as follows:

$R_{tot} = D_n \times F_{E\&D} \times NCP_1 \times Prod_{tot}$

$R_{Cal} = (Prod_{Cal}/Prod_{tot}) \times (R_{tot})$

$R_{EPA} = R_{tot} - R_{Cal}$

Where:

n=index representing the number of model years for which the NCP has been available for an engine or vehicle subclass (i.e., n=1 for the first year that NCPs are available, . . . , n=n for the n^{th} year the NCPs are available; same as ''n'' in paragraph (a)(4)).

D_n=discount factor depending on the number of model years (n) for which NCPs were available at the time of certification and PCA of the replacement configuration, and its value is as follows:

D_1=0.90
D_2=0.79
D_3=0.67
D_4=0.54
D_5=0.39
D_6=0.23
D_7=0.05
D_n=0.00 for n=8 or larger

$F_{E\&D}$=the engineering and development factor specified in section 86.1105–87 for the appropriate subclass and pollutant

NCP_1=the penalty for each engine or vehicle during the first (base) year the NCP is available as calculated in paragraph (a)

$Prod_{tot}$=total number of engines or vehicles produced in the subclass for which NCPs were paid to EPA or to the State of California

$Prod_{Cal}$=number of engines or vehicles in the subclass demonstrated to have been titled, registered or principally used in the State of California and for which NCPs were paid to the State of California under paragraph (g)(1)

R_{tot}=Total refund due to the manufacturer for the engineering and development component of the NCP

R_{Cal}=Refund due to the manufacturer from the State of California for the engineering and development component of the NCP

R_{EPA}=Refund due to the manufacturer from EPA for the engineering and development component of the NCP.

[50 FR 35388, Aug. 30, 1985, as amended at 50 FR 53467, Dec. 31, 1985; 53 FR 19134, May 26, 1988; 55 FR 46629, Nov. 5, 1990; 61 FR 51366, Oct. 2, 1996]

§ 86.1114–87 Suspension and voiding of certificates of conformity.

(a) The certificate of conformity is suspended with respect to any engine or vehicle failing pursuant to paragraph (f) of §86.1112–87 effective from the time that a fail decision is made for that engine or vehicle.

(b) Once a certificate has been suspended for a failed engine or vehicle as provided for in paragraph (a) of this section, the manufacturer shall take the following actions:

(1) Before the certificate is reinstated for that failed engine or vehicle,

(i) Remedy the nonconformity, and

(ii) Demonstrate that the engine or vehicle conforms to the applicable standards or compliance levels by retesting the engine or vehicle in accordance with these regulations; and

(2) Submit a written report to the Administrator within five working days after successful completion of testing on the failed engine or vehicle, which contains a description of the remedy and test results for each engine or vehicle in addition to other information that may be required by this regulation.

(c) The Administrator may suspend the certificate of conformity if the manufacturer, after electing to conduct a PCA, fails to adhere to the requirements stated in §86.1106–87(b)(3), (b)(6)(iii), (c)(2), or (c)(5)(iii).

(d) The Administrator may suspend the qualified certificate of conformity issued under the conditions specified in §86.1106–87 if the manufacturer fails to adhere to the requirements stated in §86.1106–87(a)(3), (a)(4)(iii), (d)(2)(iii), or (d)(3).

(e) The Administrator may suspend the certificate of conformity or the qualified certificate of conformity if the compliance level as determined in §86.1112–87(a) is in excess of the upper limit.

(f) The Administrator may void the certificate of conformity if the compliance level as determined in §86.1112–87(a) is in excess of the upper limit and the manufacturer fails to recall any engines or vehicles introduced into commerce pursuant to §86.1106–87(a)(4)(ii), (b)(6)(ii), (c)(5)(ii) or (d)(2)(ii).

(g) The Administrator may void the certificate of conformity for those engines or vehicles for which the manufacturer fails to meet the requirements of §86.1106–87(a)(4)(i), (b)(6)(i), (c)(5)(i), or (d)(2)(i).

(h) The Administrator shall notify the manufacturer in writing of any suspension or voiding of a certificate of conformity in whole or in part, except as provided for in paragraph (a) of this section.

(i) A certificate of conformity suspended or voided under paragaph (c), (d), (e), (f) or (g) of this section may be reinstated after a written request by the manufacturer and under such terms and conditions as the Administrator may require and after the manufacturer demonstrates compliance with applicable requirements.

(j) After the Administrator suspends or voids a certificate of conformity pursuant to this section or notifies a manufacturer of his intent to suspend or void a certificate of conformity under §86.087–30(e), and prior to the commencement of a hearing, if any, under §86.1115–87, if the manufacturer demonstrates to the Administrator's satisfaction that the decision to suspend or void the certificate was based on erroneous information, the Administrator shall reinstate the certificate.

§ 86.1115–87 Hearing procedures for nonconformance determinations and penalties.

(a) *Applicability*. The procedures prescribed by this section shall apply whenever a manufacturer requests a

hearing pursuant to §86.087–30(e)(6)(i), §86.087–30(e)(7), or §86.1113–87(f).

(b) *Definitions.* The following definitions shall be applicable to this section:

(1) *Hearing Clerk* shall mean the Hearing Clerk of the Environmental Protection Agency.

(2) *Manufacturer* means a manufacturer contesting a compliance level or penalty determination sent to the manufacturer.

(3) *Party* means the Agency and the manufacturer.

(4) *Presiding Officer* shall mean an Administrative Law Judge appointed pursuant to 5 U.S.C. 3105 (see also 5 CFR part 930 as amended).

(5) *Environmental Appeals Board* shall mean the Board within the Agency described in §1.25 of this title. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in appeals filed under this subpart. Appeals directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this subpart to the Administrator for decision when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this part referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

(c) *Request for public hearing.* (1) A manufacturer may request a hearing pursuant to §86.1113–87(f) if it disagrees with the Administrator's determination of compliance level or penalty calculation or both, or pursuant to §86.085–30(e)(6)(i) or §86.085–30(e)(7) if it disagrees with the Administrator's proposed suspension or voiding of a certificate of conformity. Requests for such a hearing shall be filed no later than 15 days:

(i) After receipt of the Administrator's notification of NCP, if the compliance level is in the allowable range of non-conformity, or

(ii) After completion of the Production Compliance Audit, if the compliance level exceeds the upper limit, or

(iii) After receipt of the Administrator's notification of a proposed suspension or voiding of a certificate of conformity if the hearing is requested pursuant to §§86.085–30(e)(6)(i) or 86.085–30(e)(7), unless otherwise specified by the Administrator. The manufacturer shall simultaneously serve two copies of this request upon the Director of the Manufacturers Operations Division and file two copies with the Hearing Clerk. Failure of the manufacturer to request a hearing within the time provided constitutes a waiver of the right to a hearing. Subsequent to the expiration of the period for requesting a hearing as of right, the Administrator may, in his discretion and for good cause shown, grant the manufacturer a hearing to contest the compliance level or penalty calculation.

(2) The request for a public hearing shall contain:

(i) A statement as to which vehicle or engine subclasses or configurations are to be the subject of the hearing;

(ii) A concise statement of the issues to be raised by the manufacturer at the hearing for each vehicle or engine subclass or configuration for which the manufacturer has requested the hearing. *Provided, however,* That in the case of a hearing requested under §86.1113–87(f), the hearing shall be restricted to the following issues:

(A) Whether the compliance level was determined in accordance with the procedures in §86.1112–87(a); or

(B) Whether the penalty was calculated in accordance with the procedures in §86.1113–87(a).

(iii) A statement specifying reasons why the manufacturer believes it will prevail on the merits on each of the issues so raised; and

(iv) A summary of the evidence which supports the manufacturer's position on each of the issues so raised.

(3) A copy of all requests for public hearings shall be kept on file in the Office of the Hearing Clerk and shall be made available to the public during Agency business hours.

(d) *Summary decision.* (1) In the case of a hearing requested under §86.1113–87(f) when it clearly appears from the

data and other information contained in the request for a hearing that there is no genuine and substantial question of fact with respect to the issues specified in § 86.1115–87(c)(2)(ii), the Administrator will enter an order denying the request for a hearing, and reaffirming the original compliance level determination or penalty calculation.

(2) Any order issued under paragraph (d)(1) of this section shall have the force and effect of a final decision of the Administrator, as issued pursuant to paragraph (v)(4) of this section.

(3) If the Administrator determines that a genuine and substantial question of fact does exist with respect to any of the issues referred to in paragraph (d)(1) of this section, he shall grant the request for a hearing and publish a notice of public hearing in accordance with paragraph (h) of this section.

(e) *Filing and service.* (1) An original and two copies of all documents or papers required or permitted to be filed pursuant to this section shall be filed with the Hearing Clerk. Filing shall be deemed timely if mailed, as determined by the postmark to the Hearing Clerk within the time allowed by this section. If filing is to be accomplished by mailing, the documents shall be sent to the address set forth in the notice of public hearing as described in paragraph (h) of this section.

(2) To the maximum extent possible, testimony shall be presented in written form. Copies of written testimony shall be served upon all parties as soon as practicable prior to the start of the hearing. A certificate of service shall be provided on or accompany each document or paper filed with the Hearing Clerk. Documents to be served upon the Director of the Manufacturers Operations Division shall be sent by registered mail to: Director, Manufacturers Operations Division, U.S. Environmental Protection Agency (EN–340F), 401 M Street, SW., Washington, DC 20460. Service by registered mail is complete upon mailing.

(f) *Time.* (1) In computing any period of time prescribed or allowed by this section, except as otherwise provided, the day of the act or event from which the designated period of time begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included in computing any such period allowed for the filing of any document or paper, except that when such a period expires on a Saturday, Sunday, or Federal legal holiday, such period shall be extended to include the next following business day.

(2) A prescribed period of time within which a party is required or permitted to do an act shall be computed from the time of service, except that when service is accomplished by mail, three days shall be added to the prescribed period.

(g)(1) *Consolidation.* The Administrator of the Presiding Officer in his discretion may consolidate two or more proceedings to be held under this section for the purpose of resolving one or more issues whenever it appears that such consolidation will expedite or simplify consideration of such issues. Consolidation shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred.

(2) If a vehicle or engine is determined to be in nonconformity during certification testing under subpart A of this part, then the manufacturer may wait to challenge the determination until after production compliance auditing and calculation of his penalty and may consolidate challenges to the determination of nonconformity and the compliance level determination or the penalty calculation, without losing any rights he would otherwise have had.

(3) If a vehicle or engine is determined to be in nonconformity during selective enforcement auditing under subpart K of this part, then the manufacturer must wait to challenge the determination until after the compliance level determination and the penalty calculation, and must consolidate challenges to the determination of nonconformity and the compliance level determination or the calculation of the penalty.

(h) *Notice of public hearings.* (1) Notice of public hearing under this section shall be given by publication in the FEDERAL REGISTER and by such other means as the Administrator finds appropriate to provide notice to the public. To the extent possible, hearings

under this section shall be scheduled to commence within 30 days of receipt of the application in paragraph (c) of this section.

(2) [Revised]

(i) *Amicus curiae.* Persons not parties to the proceeding wishing to file briefs may do so by leave of the Presiding Officer granted on motion. A motion for leave shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable.

(j) *Presiding Officer.* The Presiding Officer shall have the duty to conduct a fair and impartial hearing in accordance with 5 U.S.C. 554, 556 and 557 and to take all necessary action to avoid delay in the disposition of the proceedings and to maintain order. He shall have all power consistent with Agency rules and with the Administrative Procedure Act necessary to this end, including the following:

(1) To administer oaths and affirmations;

(2) To rule upon offers of proof and exclude irrelevant or repetitious material;

(3) To regulate the course of the hearings and the conduct of the parties and their counsel therein;

(4) To hold conferences for simplification of the issues or any other proper purpose;

(5) To consider and rule upon all procedural and other motions appropriate in such proceedings;

(6) To require the submission of direct testimony in written form with or without affidavit whenever, in the opinion of the Presiding Officer, oral testimony is not necessary for full and true disclosure of the facts;

(7) To enforce agreements and orders requiring access as authorized by law;

(8) To require the filing of briefs on any matter on which he is required to rule;

(9) To require any party or any witness, during the course of the hearing, to state his position on any issue;

(10) To take or cause depositions to be taken whenever the ends of justice would be served thereby;

(11) To make decisions or recommend decisions to resolve the disputed issues on the record of the hearing;

(12) To issue, upon good cause shown, protective orders as described in paragraph (n) of this section.

(k) *Conferences.* (1) At the discretion of the Presiding Officer, conferences may be held prior to or during any hearing. The Presiding Officer shall direct the Hearing Clerk to notify all parties of the time and location of such conference. At the discretion of the Presiding Officer, persons other than parties may attend. At a conference the Presiding Officer may:

(i) Obtain stipulations and admissions, receive requests and order depositions to be taken, identify disputed issues of fact and law, and require or allow the submission of written testimony from any witness or party;

(ii) Set a hearing schedule for as many of the following as are deemed necessary by the Presiding Officer:

(A) Oral and written statements;

(B) Submission of written direct testimony as required or authorized by the Presiding Officer;

(C) Oral direct and cross-examination of a witness where necessary as prescribed in paragraph (p) of this section; and

(D) Oral argument, if appropriate.

(iii) Identify matters of which official notice may be taken;

(iv) Consider limitation of the number of expert and other witnesses;

(v) Consider the procedure to be followed at the hearing; and

(vi) Consider any other matter that may expedite the hearing or aid in the disposition of the issue.

(2) The results of any conference including all stipulations shall, if not transcribed, be summarized in writing by the Presiding Officer and made part of the record.

(l) *Primary discovery (exchange of witness lists and documents).* (1) At a prehearing conference or within some reasonable time set by the Presiding Officer prior to the hearing, each party shall make available to the other parties the names of the expert and other witnesses the party expects to call, together with a brief summary of their expected testimony and list of all documents and exhibits which the party expects to introduce into evidence. Thereafter, witnesses, documents, or exhibits may be added and summaries

of expected testimony amended upon motion by a party.

(2) The Presiding Officer may upon motion by a party or other person, and for good cause shown, by order

(i) Restrict or defer disclosure by a party of the name of a witness or a narrative summary of the expected testimony of a witness, and

(ii) Prescribe other appropriate measures to protect a witness. Any party affected by any such action shall have an adequate opportunity, once he learns the name of a witness and obtains the narrative summary of this expected testimony, to prepare for the presentation of this case.

(m) *Other discovery.* (1) Except as provided by paragraph (m)(1) of this section, further discovery under this paragraph shall be permitted only upon determination by the Presiding Officer:

(i) That such discovery will not in any way unreasonably delay the proceeding;

(ii) That the information to be obtained is not obtainable voluntarily; and

(iii) That such information has significant probative value. The Presiding Officer shall be guided by the procedures set forth in the Federal Rules of Civil Procedure, where practicable, and the precedents thereunder, except that no discovery shall be undertaken except upon order of the Presiding Officer or upon agreement of the parties.

(2) The Presiding Officer shall order depositions upon oral questions only upon a showing of good cause and upon a finding that:

(i) The information sought cannot be obtained by alternative methods; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(3) Any party to the proceeding desiring an order of discovery shall make a motion or motions therefor. Such a motion shall set forth:

(i) The circumstances warranting the taking of the discovery;

(ii) The nature of the information expected to be discovered; and

(iii) The proposed time and place where it will be taken. If the Presiding Officer determines the motion should be granted, he shall issue an order for the taking of such discovery together with the conditions and terms thereof.

(4) Failure to comply with an order issued pursuant to this paragraph may lead to the inference that the information to be discovered would be adverse to the person or party from whom the information was sought.

(n) *Protective orders, in camera proceedings.* (1) Upon motion by a party or by the person from whom discovery is sought, and upon a showing by the movant that the disclosure of the information to be discovered, or a particular part thereof (other than emission data), would result in methods or processes entitled to protection as trade secrets of the person being divulged, the Presiding Officer may enter a protective order with respect to such material. Any protective order shall contain such terms governing the treatment of the information as may be appropriate under the circumstances to prevent disclosure outside the hearing, *provided* that the order shall state that the material shall be filed separately from other evidence and exhibits in the hearing. Disclosure shall be limited to parties to the hearing, their counsel and relevant technical consultants, and authorized representatives of the United States concerned with carrying out the Act. Except in the case of the government, disclosure may be limited to counsel for parties who shall not disclose such information to the parties themselves. Except in the case of the government, disclosure to a party or his counsel shall be conditioned on execution of a sworn statement that no disclosure of the information will be made to persons not entitled to receive it under the terms of the protective order. (No such provision is necessary where government employees are concerned because disclosure by them is subject to the terms of 18 U.S.C. 1905.)

(2)(i) A party or person seeking a protective order may be permitted to make all or part of the required showing in camera. A record shall be made of such in camera proceedings. If the Presiding Officer enters a protective order following a showing in camera, the record of such showing shall be

sealed and preserved and made available to the Agency or court in the event of appeal.

(ii) Attendance at any in camera proceeding may be limited to the Presiding Officer, representatives of the Agency, and the person or party seeking the protective order.

(3) Any party, subject to the terms and conditions of any protective order issued pursuant to paragraph (n)(1) of this section, that desires to make use of any in camera documents or testimony in the presentation of his case shall apply to the Presiding Officer by motion for permission to do so, and shall state the justification for the motion. The Presiding Officer, in granting any such motion, shall enter an order protecting the rights of the affected persons and parties as far as is practicable, and preventing unnecessary disclosure of such information and testimony concerning such information.

(4) In the submittal of proposed findings, briefs, or other papers, counsel for all parties shall make a good faith attempt to refrain from disclosing the specific details of in camera documents and testimony. This shall not preclude references in such proposed findings, briefs, or other papers to such documents or testimony. This shall not preclude references in such proposed findings, briefs, or other papers marked ''confidential,'' which shall become part of the in camera record.

(o) *Motions.* (1) All motions, except those made orally during the course of the hearing, shall be in writing and shall state with particularity the grounds therefore, shall set forth the relief or order sought, and shall be filed with the Hearing Clerk and served upon all parties.

(2) Within such time as may be fixed by the Environmental Appeals Board or the Presiding Officer, as appropriate, any party may serve and file an answer to the motion. The movant shall, if requested by the Environmental Appeals Board or the Presiding Officer, as appropriate, serve and file reply papers, within the time set by the request.

(3) The Presiding Officer shall rule upon all motions filed or made prior to the filing of his decision or accelerated decision, as appropriate. The Environmental Appeals Board shall rule upon all motions filed prior to the appointment of a Presiding Officer and all motions filed after the filing of the decision of the Presiding Officer or accelerated decision. Oral argument of motions will be permitted only if the Presiding Officer or the Environmental Appeals Board, as appropriate, deems it necessary.

(p) *Evidence.* (1) The official transcripts and exhibits, together with all papers and requests filed in the proceeding, shall constitute the record. Immaterial or irrelevent parts of an admissible document shall be segregated and excluded so far as practicable. Documents or parts thereof subject to a protective order under paragraph (n) of this section shall be segregated. Evidence may be received at the hearing even though inadmissible under the rules of evidence applicable to judicial proceedings. The weight to be given evidence shall be determined by its reliability and probative value.

(2) The Presiding Officer shall allow the parties to examine and cross-examine a witness to the extent that such examination and cross-examination is necessary for a full and true disclosure of the facts.

(3) Rulings of the Presiding Officer on the admissibility of evidence, the propriety of examination and cross-examination and other procedural matters shall appear in the record.

(4) Parties shall automatically be presumed to have taken exception to an adverse ruling.

(q) *Record.* (1) Hearings shall be stenographically reported and transcribed and the original transcripts shall be part of the record. Copies of the records shall be filed with the Hearing Clerk and made available during Agency business hours for public inspection. Any person who wants a copy of the record of the hearing or any part thereof, except as provided in paragraph (n) of this section, shall be entitled to the same upon payment of the cost thereof.

(2) The official transcripts and exhibits, together with all papers and requests filed in the proceeding, shall constitute the record.

(r) *Proposed findings, conclusions.* (1) Within 30 days of the close of the reception of evidence, or within such longer time as may be fixed by the Presiding Officer, any party may submit for the consideration of the Presiding Officer proposed findings of fact, conclusions of law, and a proposed order, together with reasons therefore and briefs in support thereof. Such proposals shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied upon.

(2) The record shall show the Presiding Officer's ruling on the proposed findings and conclusions except when his order disposing of the proceeding otherwise informs the parties of the action taken by him.

(s) *Decision of the Presiding Officer.* (1) Unless extended by the Environmental Appeals Board, the Presiding Officer shall issue and file with the Hearing Clerk his decision within 30 days after the period for filing proposed findings has expired, as provided for in paragraph (c) of this section.

(2) The Presiding Officer's decision shall become the decision of the Environmental Appeals Board (i) 10 days after issuance thereof, if no notice of intention to appeal as described in paragraph (t) of this section is filed, unless in the interim the Environmental Appeals Board shall have taken action to review or stay the effective date of the decision; or (ii) 5 days after expiration of the period allowed by paragraph (t)(1) of this section for perfection of an appeal, if a notice of intention to appeal is filed but the appeal is not perfected, unless within that 5 day period the Environmental Appeals Board shall have taken action to review or stay the effective date of the decision;

(3) The Presiding Officer's decision shall include a statement of findings and conclusions, as well as the reasons or basis therefore, upon all the material issues of fact or law presented on the record and an appropriate rule or order. Such decision shall be supported by substantial evidence and based upon a consideration of the whole record.

(4) At any time prior to the issuance of his decision, the Presiding Officer may reopen the proceeding for the reception of further evidence. Except for the correction of clerical errors, the jurisdiction of the Presiding Officer is terminated upon the issuance of his decision.

(t) *Appeal from the decision of the Presiding Officer.* (1) Any party to a proceeding may appeal the Presiding Officer's decision to the Environmental Appeals Board, *Provided,* That within 10 days after issuance of the Presiding Officer's decision such party files a notice of intention to appeal and an appeal brief within 20 days of such decision.

(2) When an appeal is taken from the decision of the Presiding Officer, any party may file a brief with respect to such appeal. The brief shall be filed within the same time limits as the appellant's brief.

(3) Any brief filed pursuant to this paragraph shall contain in the order indicated, the following:

(i) A subject index of the matter in the brief, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto;

(ii) A specification of the issues intended to be appealed;

(iii) The argument, presenting clearly the points of fact and law relied upon in support of the position taken on each issue, with specific page references to the record and legal or other material relied upon; and

(iv) A proposed order for the Environmental Appeals Board's consideration if different from the order contained in the Presiding Officer's decision.

(4) No brief in excess of 15 pages shall be filed without leave of the Environmental Appeals Board.

(5) Oral argument will be allowed only in the discretion of the Environmental Appeals Board.

(u) *Review of the Presiding Officer's decision in absence of appeal.* (1) If, after the expiration of the period for taking an appeal as provided for by paragraph (t) of this section, no notice of intention to appeal the decision of the Presiding Officer has been filed, or if filed, not perfected, the Hearing Clerk shall so notify the Environmental Appeals Board.

(2) The Environmental Appeals Board, upon receipt of notice from the Hearing Clerk that no notice of intention to appeal has been filed, or if filed, not perfected pursuant to paragraph (t)(1) of this section, may, on its own motion, within 14 days after notice from the Hearing Clerk, review the decision of the Presiding Officer. Notice of the intention of the Environmental Appeals Board to review the decision of the Presiding Officer shall be given to all parties and shall set forth the scope of such review and the issues which shall be considered and shall make provisions for filing of briefs.

(v) *Decision of appeal or review.* (1) Upon appeal from or review of the Presiding Officer's the Environmental Appeals Board shall consider such parts of the record as are cited or as may be necessary to resolve the issues presented and in addition shall, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had presided at the hearing.

(2) In rendering its decision, the Environmental Appeals Board shall adopt, modify, or set aside the findings, conclusions, and order contained in the decision of the Presiding Officer and shall set forth in its decision a statement of the reasons or bases for this action.

(3) In those cases where the Environmental Appeals Board determines that it should have further information or additional views of the parties as to the form and content of the rule or order to be issued, the Environmental Appeals Board, in its discretion, may without final action pending the receipt of such additional information or views, or may remand the case to the Presiding Officer.

(4) Any decision rendered under this paragraph which completed disposition of a case shall be a final decision of the Environmental Appeals Board.

(w) *Reconsideration.* Any party may file with the Environmental Appeals Board a petition for reconsideration of such decision setting forth the relief desired and the grounds in support thereof. This petition must be filed within 20 days of the issuance of the Environmental Appeals Board's decision, and must be confined to new questions raised by the decision or final order and which the petitioner had no opportunity to argue before the Presiding Officer or the Environmental Appeals Board, unless otherwise specified by the Environmental Appeals Board. Subsequent to the expiration of the period for petitioning for reconsideration, the Environmental Appeals Board may, in its discretion and for good cause shown, grant the manufacturer a hearing to contest the compliance level or the penalty calculation even though such issues may have been raised in the previous proceeding. Any party desiring to oppose such a petition, shall file an answer thereto within 10 days after the filing of the petition. The filing of a petition for reconsideration shall not operate to stay the effective date of the decision or order or to toll the running of any statutory time period affecting such decision or order unless specifically so ordered by the Environmental Appeals Board.

(x) *Accelerated decision, dismissal.* (1) The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the Agency or the manufacturer as to all or any part of the proceeding, without further hearing or upon such limited additional evidence such as affidavits as he may require, or dismiss any party with prejudice, for any of the following reasons:

(i) Failure to state a claim upon which relief can be granted, or direct or collateral estoppel;

(ii) The lack of any genuine issue of material fact, causing a party to be entitled to judgment as a matter of law; or

(iii) Such other and further reasons as are just, including specifically, failure to obey a procedural order of the Presiding Officer.

(2) If under this paragraph an accelerated decision is issued as to all the issues and claims joined in the proceeding, the decision shall be treated for the purposes of these procedures as the decision of the Presiding Officer, as provided in paragraph (s) of this section.

(3) If under this paragraph, judgment is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts are

actually and in good faith controverted. He shall thereupon issue an order specifying the facts which appear without substantial controversy, and the issues and claims upon which the hearing will proceed.

(y) *Conclusion of hearing.* (1) If, after the expiration of the period for taking an appeal as provided by paragraph (t) of this section, no appeal has been taken from the Presiding Officer's decision, and after the expiration of the period for review by the Environmental Appeals Board on its own motion as provided for by paragraph (u) of this section, the Environmental Appeals Board does not move to review such decision, the hearing will be deemed to have ended at the expiration of all periods allowed for such appeal and review.

(2) If an appeal of the Presiding Officer's decision is taken pursuant to paragraph (t) of this section, or if, in the absence of such appeal the Environmental Appeals Board moves to review the decision of the Presiding Officer pursuant to paragraph (u) of this section, the hearing will be deemed to have ended upon issuance of a final decision by the Environmental Appeals Board.

(z) *Judicial review.* (1) The Administrator hereby designates the General Counsel of the Environmental Protection Agency as the officer upon whom any copies for judicial review shall be served. Such officer shall be responsible for filing in the court the record on which the order of the Environmental Appeals Board is based.

(2) [Reserved]

[50 FR 35388, Aug. 30, 1985, as amended at 50 FR 53467, Dec. 31, 1985; 55 FR 46630, Nov. 5, 1990; 57 FR 5333, Feb. 13, 1992]

§ 86.1116–87 Treatment of confidential information.

(a) Any manufacturer may assert that some or all of the information submitted pursuant to this subpart is entitled to confidential treatment as provided by 40 CFR part 2, subpart B.

(b) Any claim of confidentiality must accompany the information at the time it is submitted to EPA.

(c) To assert that information submitted pursuant to this subpart is confidential, a manufacturer must indicate clearly the items of information claimed confidential by marking, circling, bracketing, stamping, or otherwise specifying the confidential information. Furthermore, EPA requests, but does not require, that the submitter also provide a second copy of its submittal from which all confidential information has been deleted. If a need arises to publicly release nonconfidential information, EPA will assume that the submitter has accurately deleted the confidential information from this second copy.

(d) If a claim is made that some or all of the information submitted pursuant to this subpart is entitled to confidential treatment, the information covered by that confidentiality claim will be disclosed by the Environmental Appeals Board only to the extent and by means of the procedures set forth in part 2, subpart B, of this chapter.

(e) Information provided without a claim of confidentiality at the time of submission may be made available to the public by EPA without further notice to the submitter, in accordance with 40 CFR 2.204(c)(2)(i)(A).

[50 FR 34798, Aug. 27, 1985, as amended at 57 FR 5334, Feb. 13, 1992]